MODIFIED 8/02/11

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	WD71175
	)	
DAVID BRYAN MILLER	)	Opinion filed: June 21, 2011
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSOURI
The Honorable Jack N. Peace, Judge

Before Division Two: Karen King Mitchell, Presiding Judge,
Joseph M. Ellis, Judge and Victor C. Howard, Judge

David Miller appeals from his convictions on one count each of statutory sodomy, § 566.062; child molestation in the first degree, § 566.067; deviate sexual assault, § 566.070; sexual misconduct involving a child, § 566.083; endangering the welfare of a child in the first degree, §568.045; and incest, § 568.020. For the following reason, the judgment is reversed in part.

In late December 2005, Appellant's fourteen-year-old daughter, E.N.M., informed a friend of hers that her father had been sexually abusing her since she was six-years-old. The friend told her mother, who, in turn, informed E.N.M.'s mother what E.N.M. had said.

E.N.M.'s mother took E.N.M. to the police station where E.N.M. informed officers that she had been sexually abused by Appellant at Appellant's farm house in Hatfield, Missouri from the time she was six-years-old. On January 31, 2006, sheriff's deputies served an order of protection on Appellant at his Hatfield home. Appellant gave the deputies permission to search the home. When the deputies asked Appellant if he had any condoms, Appellant retrieved a box of condoms from under the bathroom sink. At some point, a deputy provided Appellant with *Miranda* warnings, and Appellant indicated he understood those warnings. After discussing the order of protection with Appellant for a while, the deputies asked Appellant to come to the police station for an interview.

After they arrived at the station, a deputy again provided Appellant with *Miranda* warnings, and Appellant signed a *Miranda* form. Appellant denied the allegations against him and indicated that he thought his ex-wife had put his daughter up to making those allegations.

Appellant was eventually charged by way of information filed in the Circuit Court of Harrison County with ten counts alleging that he sexually abused E.N.M. over an eight year period between December 3, 1997 and January 22, 2006. Count I charged statutory rape in the second degree; Count II, sexual assault; Count III, statutory sodomy in the first degree; Count IV, child molestation in the first degree; Count V, deviate sexual assault; Count VI, sexual misconduct involving a child; Count VII, incest; Count VIII, endangering the welfare of a child in the first degree; Count IX, a second charge of incest; and Count X, statutory rape in the first degree.

Following a jury trial, Appellant was found not guilty under Counts I, II, VII, and X. The jury, however, found Appellant guilty of Counts III, IV, V, VI, VIII and IX. The trial court subsequently sentenced Appellant, respectively, to concurrent terms of imprisonment of fifty years, ten years, seven years, four years, five years, and four years.[1] Appellant brings ten points on appeal.

In his first point, Appellant claims that the trial court erred in failing to grant his motion for acquittal at the close of all evidence on his convictions for statutory sodomy and deviate sexual assault. He asserts that the evidence was insufficient to support those convictions.

"In reviewing a challenge to the sufficiency of the evidence supporting a criminal conviction, we are limited to determining whether sufficient evidence was presented from which a reasonable juror could find the defendant guilty beyond a reasonable doubt." ***State v. Presberry***, 128 S.W.3d 80, 96 (Mo. App. E.D. 2003). In making that assessment, we view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the jury's verdict and disregard evidence and inferences to the contrary. ***Id***. "In considering the sufficiency of the evidence, there must be sufficient evidence of each element of the offense." ***Id***. (internal quotation omitted).

An individual is guilty of first-degree statutory sodomy when that person "has deviate sexual intercourse with another person who is less than fourteen years old." ***§ 566.062***.[2] "A person commits the crime of deviate sexual assault if he has deviate

[1] Appellant had waived jury sentencing prior to trial.
[2] All statutory references are to both RSMo 1994 and RSMo 2000 unless otherwise noted.

sexual intercourse with another person knowing that he does so without that person's consent." ***§ 566.070(1)***. With regard to both offenses, "deviate sexual intercourse" is defined, in relevant part, as "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person . . . done for the purpose of arousing or gratifying the sexual desire of any person." ***§ 566.010(1)***.

In the case at bar, the jury was instructed to find Appellant guilty of statutory sodomy in the first degree if it found beyond a reasonable doubt:

> First, that between December 3, 2004 and December 3, 2005, . . . the defendant put his finger in E.N.M.'s vagina, and
>
> Second, that such conduct constituted deviate sexual intercourse, and
>
> Third, that at that time E.N.M. was less than fourteen years old[.]

The jury was instructed to find Appellant guilty of deviate sexual assault if it found beyond a reasonable doubt:

> First, that between December 3, 2004 and December 3, 2005, . . . the defendant put his finger in E.N.M.'s vagina, and
>
> Second, that such conduct constituted deviate sexual intercourse, and
>
> Third, that defendant did so without the consent of E.N.M., and
>
> Fourth, that defendant knew that he did not have the consent of E.N.M.

Thus, the deviate sexual act charged in both the statutory sodomy and the deviate sexual assault counts was finger to vagina contact.

Appellant argues that the only evidence of digital penetration of E.N.M.'s vagina related to an incident occurring when she was seven years old between December 3, 1998, and December 3, 1999. He claims that, while sufficient evidence was presented

under which he could have been found guilty of statutory sodomy based upon incidents of oral and anal sex during the charged period, he was not charged with those acts and that there was no evidence that he placed his finger in E.N.M.'s vagina in 2004 or 2005.

In making his argument, Appellant mistakenly presumes that the inclusion of a time period during which the offense was committed made the time of the offense an essential element of the crime which the State was required to prove in order to support a conviction. This argument "ignores the well-settled law of this state that, in sex offense cases, time is not of the essence." ***State v. Bunch***, 289 S.W.3d 701, 703 (Mo. App. S.D. 2009); *see also* ***State v. Celis-Garcia***, SC90980 at *6 n.4 (Mo. banc June 14, 2011) ("time is not of the essence in a statutory sodomy case"). "Because time is not an essential element of the crime, the state is not confined in its evidence to the precise date stated in the information, but may prove the offense to have been committed on any day before the date of the information and within the period of limitations." ***State v. Carney***, 195 S.W.3d 567, 571 (Mo. App. S.D. 2006) (internal quotation omitted). The inclusion of a more restrictive time range in an instruction constitutes mere surplusage. ***Id***. at 571-72.

Appellant has not challenged, nor could he reasonably challenge, the sufficiency of the evidence to establish the essential elements of first-degree statutory sodomy and deviate sexual assault. As to statutory sodomy, E.N.M.'s testimony clearly supported a finding that Appellant had deviate sexual intercourse with E.N.M. by placing his finger in her vagina when she was less than fourteen years of age. As to deviate sexual assault, E.N.M.'s testimony established that Appellant placed his finger in her vagina without her

consent to do so. As both counts are clearly supported by sufficient evidence, Appellant's point is denied.

In his second point, Appellant claims the trial court erroneously denied his motion for acquittal as to the child molestation in the first degree count, contending that the evidence was insufficient to support that conviction. In his fifth point, Appellant contends that the trial court committed plain error in submitting the verdict directing instruction on that count to the jury because it permitted the jury to convict him based upon conduct that was not criminal at the time it occurred in violation of the Ex Post Facto clause. Because they overlap to some extent, these points will be addressed together.

Count IV of the information charged Appellant with child molestation in the first degree, alleging that, between December 3, 1997, and December 3, 1998, he subjected E.N.M. to sexual contact when she was less than fourteen years of age. The verdict director on that count instructed the jury:

> As to Count IV, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that between December 3, 1997 and December 3, 1998, . . . the defendant touched the genitals of E.N.M. through the clothing, and
>
> Second, that he did so for the purpose of arousing his own sexual desire, and
>
> Third, that E.N.M. was less than fourteen years old,
>
> Then you will find the defendant guilty under Count IV of child molestation in the first degree.

In contending that the evidence was insufficient to support his conviction on this count, Appellant argues that the record does not contain any evidence that he touched E.N.M.'s genitals through the clothing.

In response, the State contends that the language of the verdict director is irrelevant to determining whether the evidence was sufficient to support a conviction and that a conviction is supported by sufficient evidence if evidence in the record sufficiently supports a finding that Appellant was guilty of any of the methods of perpetrating the crime allowed by statute. The State then notes that the statutory definition of sexual contact was "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person" and contends that Appellant's conviction is sufficiently supported by evidence that Appellant had placed his penis between her legs on one occasion and that he had oral and anal sex with E.N.M. from the time she was six until twelve. In making these arguments, the State ignores that the jury instruction defines the elements of the crime. Thus, whether the evidence is sufficient to support a conviction is inextricably tied to the jury instruction.

Unlike the time of the offense, which, as discussed *supra*, is not an essential element thereof, the method of the charged offense, as prescribed by statute, is an essential element of the crime. A jury must make a factual finding on that issue in order to convict the defendant, and substantial evidence must support that finding. As the jury is the fact-finder in any jury-tried case, "to allow a conviction on a method of the charged offense never submitted to the jury, would be to effectively deny the defendant of his

right to a jury trial in that the jury would not be instructed on the . . . method of conviction supported by the evidence." ***State v. Young***, 172 S.W.3d 494, 499 (Mo. App. W.D. 2005). Accordingly, even if there is sufficient evidence to convict a defendant of the charged crime on an alternative basis for the offense permitted by statute, where that method was not submitted to the jury, the conviction cannot stand. ***Id***.; *see also* ***State v. Bisans***, 104 S.W.3d 805, 807-08 (Mo. App. W.D. 2003).

There is absolutely no evidence in the record that Appellant touched E.N.M.'s genitals through her clothing. The State concedes that it was error to submit that means of touching in the verdict director. As no reasonable juror could have found beyond a reasonable doubt that Appellant touched E.N.M.'s genitals through her clothing, Appellant's conviction and sentence on Count IV, child molestation in the first degree, must be reversed.

As to this Count, we likewise observe that the verdict directing instruction allowed Appellant to be convicted for actions that did not constitute child molestation during the period charged in the information and the instruction. Under the version of § 566.067 in effect in 1997 and 1998, an individual committed the crime of child molestation in the first degree if he or she subjected a child under the age of twelve to sexual contact. Pursuant to § 566.010(3), RSMo 1994, in effect in 1997 and 1998, "sexual contact" was defined as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, for the purpose of arousing or gratifying sexual desire of any person." It was not until August 28, 2002, that the definition of "sexual contact" was expanded to include touching through

clothing. Accordingly, even if the record contained evidence to support a finding that Appellant touched E.N.M.'s genitals through her clothing, such actions did not constitute sexual contact at the time those actions were alleged to have occurred.

In addition, under the 1994 version of the § 566.067, child molestation in the first degree was a class C felony punishable by a maximum of seven years imprisonment. Amendments in 2000 upgraded child molestation in the first degree to a class B felony. ***§ 566.067***, RSMo 2000. Accordingly, Appellant was sentenced in excess of the maximum sentence allowed at the time the alleged offenses occurred.

The State concedes that the language in the verdict directing instruction and the sentence imposed on Appellant violated the ex post facto provisions of Article I, Section 10 of the United States Constitution and article I, section 13 of the Missouri constitution.[3] "The prohibition against ex post facto laws prohibits any law that provides for punishment for an act that was not punishable when it was committed or that imposes an additional punishment to that in effect at the time the act was committed." ***State ex rel. Nixon v. Pennoyer***, 39 S.W.3d 521, 522 (Mo. App. E.D. 2001) (internal quotation omitted). Accordingly, even if sufficient evidence had been presented to support Appellant's conviction of the crime as charged, his conviction and sentence would need to be reversed on the basis of this ex post facto violation.

In his third point, Appellant contends that the trial court erred in denying his motion for acquittal as to the sexual misconduct involving a child count, asserting that

[3] Ex post facto claims were raised by Appellant in the argument portion of his second point and as a separate claim of instructional plain error in his fifth point.

the evidence was insufficient to establish that he knowingly exposed his genitals to E.N.M. during the period of time set forth in the indictment and the verdict directing instruction, December 3, 1997 to December 3, 1998.

"A person commits the crime of sexual misconduct involving a child if the person . . . [k]nowingly exposes his or her genitals to a child less than fourteen years of age for the purpose of arousing or gratifying the sexual desire of any person." ***§ 566.083.1***. The jury was instructed to find Appellant guilty if it found beyond a reasonable doubt:

> First that between December 3, 1997 and December 3, 1998, . . . defendant knowingly exposed his genitals to E.N.M., and
>
> Second that defendant did so for the purpose of arousing or gratifying the sexual desire of any person, and
>
> Third, that at that time E.N.M. was less than fourteen years of age[.]

As noted *supra*, when addressing a sex offense "time is not an essential element of the crime, [and] the state is not confined in its evidence to the precise date stated in the information, but may prove the offense to have been committed on any day before the date of the information and within the period of limitations." ***Carney***, 195 S.W.3d at 571 (internal quotation omitted). E.N.M. testified that, from the time she was six until she turned 12, Appellant frequently made her perform oral sex on him and repeatedly attempted to have sexual intercourse with her. From this testimony, the jury could more than reasonably have inferred that on at least one of these occasions Appellant exposed his genitals to E.N.M. in the process of forcing her to participate in these acts.[4]

[4] Sexual conduct in the first degree is not a lesser-included offense of the crime of first-degree statutory sodomy. ***State v. Greenlee***, 2010 WL 5167638 at *15 (Mo. App. E.D. 2010).

Indeed, it would be highly unusual for an act of oral sex to be accomplished without exposure of the genitals occurring. Point denied.

In his fourth point, Appellant claims that the trial court erred in denying his motion for acquittal on the endangering the welfare of a child count because the evidence was insufficient to prove he had sexual contact with E.N.M. between December 3, 2004 and December 3, 2005. Appellant contends that the evidence related to that time period only contained instances of sexual intercourse, oral sex, and anal sex and that those activities do not qualify as sexual contact under the applicable statutory language.

Pursuant to § 568.045.1, "[a] person commits the crime of endangering the welfare of a child in the first degree if . . . [t]he person knowingly engages in sexual conduct with a person under the age of seventeen years over whom the person is a parent, guardian, or otherwise charged with the care and custody." Section 566.010 defines "sexual conduct" as "sexual intercourse, deviate sexual intercourse or sexual contact." "Sexual contact" was defined as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for purposes of arousing or gratifying sexual desire of any person." ***566.010.1(3)***.

In the case at bar, the jury was directed to find the defendant guilty on this count if it found, beyond a reasonable doubt:

> First, that between December 3, 2004 and December 3, 2005, . . . the defendant engaged in sexual conduct with E.N.M., and
>
> Second, that this conduct constituted sexual contact, and

> Third, that E.N.M. was less than seventeen years of age, and
>
> Fourth, that the defendant was the parent of the child, and
>
> Fifth, that the defendant acted knowingly with respect to the facts and circumstances submitted in this instruction. . . .
>
> As used in this instruction, the term "sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person.

Appellant argues that, although the evidence clearly supported a finding that he had sexual intercourse and deviate sexual intercourse with E.N.M. and, therefore, engaged in sexual conduct with her, the evidence does not support a finding that he engaged in sexual contact with E.N.M. between December 3, 2004, and December 3, 2005, because the definition of "sexual conduct" establishes "sexual contact" as something other than "sexual intercourse" or "deviate sexual intercourse."

The actions involved in sexual intercourse and deviate sexual intercourse clearly fall within the statutory definition of sexual contact set forth in *§ 566.010.1(3)* and the verdict director. Appellant nevertheless argues that the definition of sexual conduct establishes a conflicting legislative intent to make the three categories of sexual intercourse, deviate sexual intercourse, and sexual contact mutually exclusive. Appellant then asserts that this evidences a legislative intent to modify the definition of sexual contact to exclude sexual intercourse and deviate sexual intercourse from the definition of sexual contact. We find this argument wholly unpersuasive. By definition, sexual intercourse and deviate sexual intercourse involve a "touching of another person

with the genitals or any touching of the genitals or anus of another person, or the breast of a female person. . . ." *See* ***§ 566.010(1) & (4).*** Point denied.

In his sixth point, Appellant claims that the trial court committed plain error by failing to *sua sponte* declare a mistrial when his post-arrest silence and failure to volunteer an exculpatory explanation to the police was mentioned during various testimony and argument. He argues that this testimony and argument violated the holding of ***Doyle v. Ohio***, 426 U.S. 610, 96 S.Ct. 2240 (1976).

In ***Doyle***, the United States Supreme Court held that a defendant's post-Miranda silence cannot be used to impeach him or her. ***State v. Brooks***, 304 S.W.3d 130, 133 (Mo. banc 2010). "The holding in ***Doyle*** rests on the view that it is fundamentally unfair to implicitly assure a person his silence will not be used against him and then breach that promise by using that silence against him." ***Id***. "Relying on ***Doyle*'s** notion of fundamental unfairness, Missouri's cases have held that post-***Miranda*** silence cannot be used as evidence to incriminate a defendant." ***Id***.

Appellant contends that the principles of ***Doyle*** were violated during the testimony of Deputy Rimmer, the State's cross-examination of Appellant, and in the State's closing argument. Appellant concedes that these claims were not preserved for appellate review and asks this court to review for plain error.

"Plain error affecting substantial rights may be considered in our discretion if we find that a manifest injustice or a miscarriage of justice has resulted therefrom." ***State v. Cornelious***, 258 S.W.3d 461, 465 (Mo. App. W.D. 2008) (citing ***Rule 30.20***). "Plain error can serve as the basis for granting a new trial only if the error was outcome

determinative." ***Id***. "The appellant has the burden of proving the existence of a manifest injustice or miscarriage of justice." ***Id***.

Where the appellant asserts plain error resulting from ***Doyle*** violations, "[w]e first determine whether any of these specific references actually crossed the *Doyle* line and, therefore, were erroneous." ***Id***. "Plain error is evidence, obvious, and clear error." ***State v. Calhoun,*** 259 S.W.3d 53, 58 (Mo. App. W.D. 2008). "A defendant assumes the burden of proof to demonstrate plain error." ***State v. Steger***, 209 S.W.3d 11, 17 (Mo. App. E.D. 2006). If evident, obvious and clear ***Doyle*** violation has indeed occurred, we then analyze whether those violations lead to a manifest injustice or miscarriage of justice.[5] ***Cornelious***, 258 S.W.3d at 465.

Appellant initially complains of the following testimony, presented without objection, during the direct examination of Deputy Rimmer:

Q: At any point did you read him his Miranda rights?

A: Yes, I did.

* * *

Q: And did he acknowledge that he understood his rights?

A: Yes, he did.

Q: How did he do that?

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[5] In considering whether manifest injustice or miscarriage of justice resulted from *Doyle* violations, this Court must take into consideration the following factors:

> (1) whether the government made repeated *Doyle* violations, (2) whether any curative effort was made by the trial court, (3) whether the defendant's exculpatory evidence is transparently frivolous, and (4) whether the other evidence of the defendant's guilt is otherwise overwhelming.

State v. Cornelious, 258 S.W.3d 461, 465 (Mo. App. W.D. 2008).

A: Verbally by telling me he understood.

Q: And at that time did you have him fill out the Miranda form that acknowledges waiver of rights?

A: I don't believe I did at that time.

Q: At that time, okay. But he told you that he understood his rights?

A: Yes, sir.

Q: And did he waive those rights.

A: No, sir.

Q: Did you speak to him at all about the investigation?

A: I mostly spoke to him about the order of protection.

Q: Okay. Once [Deputy] Eckerson finished searching the house what happens?

A: Once they finished searching the house Deputy Eckerson asked Mr. Miller to come to the sheriff's department for an interview.

Q: And did he agree to do that?

A: Yes, he did.

Q: Once you arrived at the department what happens?

A: Once we arrived at the department we sat down with Mr. Miller in an interview room and again he was read his Miranda rights. By this time by a form where he could read it and he signed it.

* * *

Q: And at that time did he waive his rights and speak to you?

A: Yes, he did.

Q: What if anything did he tell you? Well, let me back track. Did he talk at all about why he thought his daughter would make these allegations against him?

A: As I recall he had said something about he and his ex-wife had been divorced so he thought his ex-wife had put her up to it.

Appellant next contends that a ***Doyle*** violation arose during the State's cross-examination of Appellant. During cross-examination, in relevant part, the following exchange occurred between Appellant and the prosecutor:

Q: You testified that you were busy working January 21st and 22nd with all these people, all these witnesses on the farm with you and isn't it true that police officers came and spoke to you approximately January 30th or 31st?

A: Uh-huh.

Q: At that time did you give those police officers the name of all of these witnesses who would have been able to vouch for the fact that you were working all weekend?

A: They never asked me who was there or what was going on or anything.

Q: These charges are very serious, wouldn't you agree?

A: I believe they're very serious.

Q: And at the time you were interviewed by the police back there on January 30th or 31st of 2006 you understood that these were very serious charges, correct?

A: Yes.

Q: And wouldn't you agree that that would have been the time for you to speak up and say hey, I couldn't have done anything [sic] weekend. I had people with me all weekend. I was working?

A: I had mentioned something to the police, not of that issue but basically I was told by the police officers that they're just here to deliver papers, and that's what they told me.

Q: Well, you were mirandized not once but twice, correct?

A: I remember one time.

Q: You were taken over to the law enforcement center and they sat down and talked to you, correct?

A: Yes.

Q: And you had an opportunity to talk to those police officers and say and tell them your side of the story, correct?

A: Yes.

Q: But you chose not to say hey, I couldn't have done that that weekend, I was doing this, I was working putting in fence [sic] and I've got lots of witnesses. You didn't tell the police that at that time, did you?

A: No, I didn't.

Shortly thereafter, Appellant offered the following testimony on redirect examination:

Q: Now she's made a big deal – you cooperated with the police, didn't you?

A: Yes.

Q: You let them search your house? You talked to 'em?

A: Yes.

Q: You went down to the police station with them voluntarily, didn't you?

A: Yes, and no. I didn't feel like it was really voluntarily because I couldn't drive myself, but I went with them, yes.

Q: And you signed – you signed what they call saying you were given your right to invoke your Fifth Amendment privilege, right?

A: Yes.

Q: Now when they were asking you questions did they even ask you about January 21st and 22nd?

A: I can't remember that they did, but they were telling me of the charges that I had had on me and that was about it. I mean, they were asking questions of where I worked and stuff like that. They were grilling me, yes, I can't recall the questions they asked me.

And finally, during closing argument, the State again expressly challenged the credibility of Appellant's alibi for January 21st and 22nd based upon his failure to tell the police of that alibi when they questioned him.[6]

For its part, the State argues that these are not evident, obvious, and clear ***Doyle*** violations. The State asserts that the record does not reflect that Appellant ever invoked his Fifth Amendment right to remain silent. Rather, the State contends that after receiving the *Miranda* warnings, Appellant spoke with the police both at his home and at the police station, answered their questions, denied the various allegations against him, and gave a statement. The State reasons that "[h]aving elected to make a statement to the police, a defendant who remained 'selectively silent' may be

[6] The State offered the following argument:

> Let's also talk about Mr. Jacoby is [sic] talking about that date that they remembered that day, it was memorable. He could remember what happened that date because the police came knocking to [sic] his door with this horrible accusation. Well, I would suggest to you that in 2006, in January, the end of January, 2006 when the police knocked on his door and sat down and talked to him he understood the nature of the charges and if he was – had an alibi of something to tell the police, a reasonable person would say now what day are you talking about? And if he truly had an alibi at that time where all these people were at his house on the 21st and 22nd he would have told the police in 2006. But here we are three years later and that's when it's come out. It didn't come out when he had the opportunity to tell the police and clear himself three years ago. He didn't say no, I had people there. You can check with these people. Here are their names, you can call them and they'll tell you I was out working these fences all that day. But he didn't.

impeached by omissions in that statement." ***Morrison v. State***, 779 S.W.2d 677, 682 (Mo. App. W.D. 1989) (internal quotation omitted).

The State most certainly used Appellant's failure to inform the police of his alibi during its interrogation of him and during closing argument in an effort to impeach his testimony. And it is difficult to say that Appellant was selectively silent, or that he did not invoke his right to remain silent. However, in the final analysis, we need not decide whether there were ***Doyle*** violations and, if so, whether they were evident, obvious and clear. In this case, Appellant was acquitted on all of the charges related January 21st and 22nd, and therefore, even if there were ***Doyle*** violations, we would be unable to perceive of any manifest injustice or miscarriage of justice resulting from this line of questioning and argument.

The trial court did not plainly err in failing to *sua sponte* order a new trial on the basis of the challenged testimony and argument. Point denied.

In his seventh point, Appellant claims the trial court erred in excluding from evidence the testimony of defense witness Don Shenberger after Appellant failed to endorse him as a witness until after the State had presented its case-in-chief at trial. Appellant argues that the testimony should have been allowed because the State would not have been significantly prejudiced by its admission.

"The exclusion of the testimony of witnesses whose identity has not been properly disclosed is among the sanctions authorized by Rule 25.18." ***State v. Destefano***, 211 S.W.3d 173, 181 (Mo. App. S.D. 2007). "The sanction is used sparingly against a defendant in a criminal trial because of the trial court's duty to

ensure a fair trial by allowing the defendant to put on a defense." ***State v. Walkup***, 220 S.W.3d 748, 757 (Mo. banc 2007). Nevertheless, the exclusion of evidence as a sanction for violation of discovery rules is left to the discretion of the trial court. ***Id***. The trial court's decision "will be disturbed on appeal only when the sanction results in fundamental unfairness to the defendant." ***Destefano***, 211 S.W.3d at 181 (internal quotation omitted).

"As a matter of law, no abuse of discretion exists when the court refuses to allow the late endorsement of a defense witness whose testimony would have been cumulative, collateral, or if the late endorsement would have unfairly surprised the State." ***State v. Hopper***, 315 S.W.3d 361, 367 (Mo. App. S.D. 2010). In his offer of proof, Mr. Shenburger indicated that he would testify that he was present at Appellant's home on January 21st and 22nd, 2006; that he worked with Appellant, Christopher Miller, and others repairing the fence that weekend; that Appellant was working outside all day, both days on the fences; and that E.N.M. had a girl friend with her that weekend. That testimony would have been entirely cumulative to the testimony offered by Appellant and Christopher Miller with regard to the events of that weekend. Moreover, Appellant was acquitted of the charges stemming from that weekend, so Appellant suffered no apparent prejudice from its exclusion. Point denied.

In his eighth point, Appellant initially contends that the trial court erred in allowing E.N.M. to testify about his prior assaultive behavior toward Appellant's wife and sons. This claim of error was preserved for appellate review with a motion *in limine*, timely objections, and inclusion in the motion for new trial. He additionally contends that,

despite his failure to object, the trial court should not have allowed the State to question him about whether he had received social security disability checks while he was physically able to work. Because each of these claims require different standards of review, they will be addressed separately.

As to his preserved claim, "the trial court has broad discretion to admit or exclude evidence at trial," and its ruling will only be disturbed if the court clearly abused that discretion. ***State v. Forrest***, 183 S.W.3d 218, 223 (Mo. banc 2006). "That discretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." ***Id***. (internal quotation omitted). "Additionally, on direct appeal, this Court reviews the trial court for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." ***Id***. (internal quotation omitted).

"A defendant has the right to be tried only on the offense for which he is charged." ***State v. Davis***, 226 S.W.3d 167, 170 (Mo. App. W.D. 2007). Accordingly, "[a]s a general rule, evidence of uncharged misconduct is inadmissible for the purpose of showing the propensity to commit such crimes." ***Id***. (internal quotation omitted).

In the case at bar, however, the trial court admitted E.N.M.'s testimony related to Appellant's physical abuse of her mother and brothers solely for the purpose of explaining the reason for her delay in reporting his sexual abuse of her. Prior bad acts may be "admissible to explain that a witness's fear of the defendant led to a delay in reporting a matter to the police." ***State v. Hitchcock***, 329 S.W.3d 741, 750 (Mo. App.

S.D. 2011). The trial court did not abuse its discretion in finding that the E.N.M.'s testimony was logically and legally relevant for this purpose.

Because Appellant's claims related to the State's questions about his receipt of Social Security benefits were not preserved for appeal, Appellant's claims may only be reviewed for plain error. As noted *supra,* "[p]lain error affecting substantial rights may be considered in our discretion if we find that a manifest injustice or a miscarriage of justice has resulted therefrom." ***Cornelious***, 258 S.W.3d at 465 (citing ***Rule 30.20***). "The appellant has the burden of proving the existence of a manifest injustice or miscarriage of justice." ***Id***.

Appellant testified on direct examination that, after his back surgery, he went back to work fulltime in 2003. He stated that, despite working on the farm and having tried to get off of Social Security, he continued to receive Social Security checks from the government for three more years. "A defendant cannot be prejudiced by admission of objectionable evidence if he offers similar evidence." ***State v. Placke***, 290 S.W.3d 145, 154 (Mo. App. S.D. 2009). Accordingly, the trial court did not plainly err in allowing the State to question Appellant about his receipt of Social Security checks. Point denied.

In his ninth point, Appellant claims that the trial court committed plain error by failing to *sua sponte* declare a mistrial during the State's closing argument when the State argued facts not in evidence related to the temperature on January 21 and 22, 2006. The State argued that Appellant's testimony that it was 50 or 60 degrees that day was not credible and that it was actually fairly cold.

"Plain error relief is rarely appropriate for claims involving closing argument because the decision to object is often a matter of trial strategy." ***State v. Anderson***, 306 S.W.3d 529, 543 (Mo. banc 2010). "Under plain error review, a conviction will be reversed for improper closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice." ***Id***.

Appellant was acquitted of the charges related to January 21 and 22, and he has failed to present any convincing argument as to how the State's argument had a decisive effect upon his other convictions. Perceiving no manifest injustice, we decline to exercise our discretion to review for plain error. Point denied.

In his final point, Appellant claims that the trial court erred in failing to grant his motion for new trial based upon the cumulative effect of the aforementioned claims of error. Having found that only one of Appellant's claims of error was meritorious, there is no cumulative effect to consider. "Numerous non-errors cannot add up to error." ***State v. Buchli***, 152 S.W.3d 289, 309 (Mo. App. W.D. 2004) (internal quotation omitted). Point denied.

Having found that Appellant's conviction for child molestation was not supported by sufficient evidence, his conviction and sentence on that count are reversed. In all other respects, the judgment is affirmed.

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Joseph M. Ellis, Judge

All concur.